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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO DUANE VIGIL,

Defendant and Appellant.

B174893

(Los Angeles County
Super. Ct. No. VA079977)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry S. Knupp, Judge. Affirmed in part; reversed in part.

Kiana Sloan-Hillier, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth N. Sokoler, Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Roberto Duane Vigil, appeals from his conviction by jury for unlawful driving or taking of an automobile (Veh. Code, § 10851, subd. (a)) and the trial court's finding that he was previously convicted of a serious felony and served a prior prison term. (Pen. Code,¹ §§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12.) Defendant argues the trial court improperly permitted the prosecutor to amend the information after the jury was discharged. We agree and modify the judgment to impose a four-year sentence. Additionally, defendant argues: the trial court should not have found aggravating factors in imposing the upper term without supporting jury findings; he was denied effective assistance of counsel; and the abstract of judgment must be modified. As to these latter contentions, we agree only that the abstract of judgment must be modified.

When the evidence is viewed in a light most favorable to the judgment (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909), defendant took the truck of Hugo Castillo and drove away. Mr. Castillo saw his truck a month later, followed it, and called the police. Defendant was arrested shortly thereafter.

First, defendant argues that the trial court improperly allowed the prosecutor to amend the information after the jury was dismissed. We review contentions concerning a motion to amend for an abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716; *People v. Villagren* (1980) 106 Cal.App.3d 720, 724.) Here, the information, as originally filed, alleged pursuant to sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), that defendant had previously been convicted of violating sections 245, subdivision (a) and "459R" (residential burglary), in Los Angeles Superior Court case No. A453986 on June 1, 1982. Before trial, the prosecutor dismissed the allegation defendant had previously been convicted of committing a residential burglary. The clerk's minutes stated, "People dismiss the residential burglary strike

¹ All further statutory references are to the Penal Code unless otherwise indicated.

allegation as to A453986 as it is not a strike.” Defendant waived his right to a jury trial on the prior conviction and prison term allegations.

Defendant was convicted of the charged offense by a jury. The jury was then dismissed. On the date set for trial on the prior conviction and prison term allegations, the prosecutor moved to amend the information noting, “. . . We would make a motion. We struck the 459 portion of the alleged strike. [¶] . . . [¶] On 2/20. We actually should have stricken the 245 and not the 459. We made an error on that. It’s actually the same case. I believe he pleaded guilty on the 459, according to the records that we have. We make a motion to correct that and allege it as the 459 as opposed to the 245.” Defense counsel stated, “I’d like to object to that.” The trial court overruled defendant’s objection and granted the motion to amend.

Section 1009 provides in pertinent part, “. . . The court in which an action is pending may order or permit an amendment of an indictment, accusation or information . . . for any defect or insufficiency, at any stage of the proceedings . . . unless the substantial rights of the defendant would be prejudiced thereby” Section 969a provides, “Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted . . . said indictment or information may be forthwith amended to charge such prior conviction or convictions” In *People v. Tindall* (2000) 24 Cal.4th 767, 776, the California Supreme Court held: “[A]lthough the prosecution may amend an information to add alleged prior convictions on the trial court’s order until sentencing [citation], the court may not permit such an amendment if the jury has been discharged, unless the defendant waives or forfeits the right to have the same jury try both guilt and priors. [Citations.]” (*Ibid.*, italics added; § 1025, subd. (b); *People v. Saunders* (1993) 5 Cal.4th 580, 591.) Allowing an amendment under these circumstances after the jury has been discharged is an act in excess of a trial court’s jurisdiction. (*People v. Tindall, supra*, 24 Cal.4th at pp. 769-770; *People v. Gutierrez* (2001) 93 Cal.App.4th 15, 19-24; see *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1235.) Hence, under the controlling authority of *Tindall*,

the prior serious felony conviction finding is reversed. Defendant's sentence is modified to three years plus one year for the prior prison term enhancement.

Second, citing *Blakely v. Washington* (2004) 542 U.S. ___, ___ [124 S.Ct. 2531, 2537-2539, 2543] and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, defendant argues he was entitled to a jury trial on the aggravating factors relied upon by the trial court in selecting the upper term. The Attorney General argues this issue has been forfeited because it was not raised in the trial court. We agree. (*United States v. Booker* (Jan. 12, 2005) 543 U.S. ___, ___ [2005 WL 50108]; *United States v. Cotton* (2002) 535 U.S. 625, 628-634.)

In any event, there is no possibility of a different result had the matter been submitted to a jury. The trial court imposed the high term based upon the following aggravating factors: "[T]he crime did involve the actual taking of a vehicle of great monetary value. The defendant was on parole when the crime was committed. Defendant's prior performance on probation or parole has been unsatisfactory consistently throughout his life." Additionally, the trial court adverted to defendant's extensive prior record. The trial court found no mitigating factors. In the face of federal constitutional error of the type at issue here, we apply the *Chapman v. California* (1967) 386 U.S. 18, 22 harmless error test. (*United States v. Booker, supra*, 543 U.S. at p. ___ [2005 WL 50108]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Here, there were no mitigating factors. The trial court relied in part on defendant's prior record, which is not subject to the federal constitutional jury trial right. (*Blakely v. Washington, supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2536]; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) In the absence of any mitigating circumstances, the trial court was virtually required to impose the upper term. (See Cal. Rules of Court, rule 4.420(b) ["Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation"]; *People v. Osband, supra*, 13 Cal.4th at pp. 728-729; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.)

Defendant's prior history is one of unrelenting criminality. On June 15, 1982, defendant was sentenced to five years in state prison following his conviction for first degree burglary. Defendant was paroled on December 24, 1985. However, on April 15, 1988, he was returned to prison following a violation of his parole. On April 11, 1989, defendant was convicted of misdemeanor inflicting corporal injury on a spouse or cohabitant, was required to serve 90 days in jail, and placed on 24 months summary probation. (§ 275.3, subd. (a).) On September 15, 1989, defendant was convicted of misdemeanor false identification to a peace officer and was sentenced to two days in jail. (§ 148.9.) On November 7, 1990, defendant was convicted of misdemeanor being under the influence of a controlled substance. (Health & Saf. Code, § 11550, subd. (a).) Defendant was sentenced to 180 days in jail. On December 14, 1990, defendant was convicted of second degree burglary and sentenced to 16 months in state prison. Defendant was paroled on July 19, 1991. On October 13, 1992, defendant was convicted of misdemeanor tampering with a vehicle. (Veh. Code, § 10851, subd. (b).) Defendant was sentenced to 90 days in jail and order to serve 36 months summary probation. On August 9, 1993, defendant was convicted of sale of a controlled substance. (Health & Saf. Code, § 11352, subd. (a).) Defendant was ordered to serve 365 days in jail as a condition of 36 months formal probation. Defendant's probation was revoked on December 10, 1996. Defendant was sentenced to three years in state prison concurrent with another conviction for taking a vehicle without the owner's consent. Defendant was returned to prison on July 7, 1997, for a parole violation following his conviction for taking a vehicle without the owner's consent. His parole was again revoked on June 14, 1999, after he was convicted of being under the influence of a controlled substance. On April 5, 2002, defendant was convicted of being under the influence of a controlled substance in two separate cases. He was ordered to serve 37 days in jail and as a condition of 36 months probation. On June 17, 2002, defendant was convicted of second degree burglary and sentenced to two years in prison. Defendant was paroled on June 22, 2003. The offense in this case occurred on December 8, 2003. Given the uncontroverted

evidence of defendant's extensive prior record, none of which is subject to a potential jury trial right, any *Blakely* error was harmless beyond a reasonable doubt. (*United States v. Booker, supra*, 543 U.S. at p.____; *Chapman v. California, supra*, 386 U.S. at p. 22.)

Third, defendant argues that he was denied effective assistance of counsel. Defendant reasons that defense counsel did not object to the trial court's use of an element of the offense as an aggravating factor in imposing the upper term. California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term for an enhancement. (*People v. Osband, supra*, 13 Cal.4th at pp. 728-729; *People v. Castaneda* (1999) 75 Cal.App.4th 611, 615; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Here, the trial court relied on two factors in addition to the value of the automobile in imposing the upper term; namely, defendant's parole status at the time of the offense and his extensive history of failure on both probation on parole as set forth above. Additionally, the trial court referred to defendant's prior record. Those factors, even standing alone, support the trial court's selection of the upper term for the taking of the automobile. Moreover, the value of the automobile was *not* an element of the offense. It was also an appropriate factor for the trial court to consider at sentencing. A criminal defense attorney need not pursue futile or meritless objections or argument. (*People v. Prieto* (2003) 30 Cal.4th 226, 261; *People v. Ochoa* (1998) 19 Cal.4th 353, 432-435.)

Finally, defendant argues and the Attorney General concedes that the abstract of judgment should be corrected to reflect that defendant's trial was by jury rather than by a guilty plea. We agree. California Rules of Court, rule 12(c)(1) provides in pertinent part, "On motion of a party . . . or on its own motion, the reviewing court may order the correction . . . of any part of the record." (See also *People v. Mitchell* (2001) 26 Cal.4th 181, 186-188.) We direct the clerk of the superior court to correct the abstract of judgment to state that defendant was convicted by a jury rather than by a guilty plea.

Defendant's sentence of seven years is reversed. Defendant is to be sentenced to the upper term of three years in state prison, plus one year for the prior prison term enhancement. Additionally, the abstract of judgment is to be corrected to reflect that defendant was convicted by a jury. Upon issuance of the remittitur, the superior court clerk is to prepare an amended abstract of judgment which correctly reflects the foregoing and forward it to the Department of Corrections. The judgment is affirmed in all other respects.

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TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.*

* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.